

EXHIBIT E-1

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

DAVID LANE JOHNSON ~~2400-~~
~~Rosewood Lane Edmond, OK-~~
~~73013,~~

Plaintiff ~~Movant,~~

v.

NATIONAL FOOTBALL LEAGUE
PLAYERS ASSOCIATION ~~1133-~~
~~20th Street NW Washington, DC-~~
~~20036, et al.,~~

and

~~NATIONAL FOOTBALL LEAGUE~~
~~345 Park Avenue New York, NY-~~
~~10154~~

and

~~NATIONAL FOOTBALL LEAGUE~~
~~MANAGEMENT COUNCIL 345-~~
~~Park Avenue New York, NY 10154,~~

Defendants ~~/~~

~~Respondent~~

s.

) Case No. 5:17-cv-00047-SL

)

) Judge Sara Lioi

)))

) *Plaintiff's First Amended Complaint and*
Petition to Vacate ~~Arbitration Award~~

))))))))))

BACKGROUND

Pursuant to Fed. R. Civ. P. 15(a)(1)(B), Plaintiff ~~Movant~~ David Lane Johnson (“Johnson”) ~~hereby~~ files this First Amended Complaint and Petition to Vacate Arbitration Award.¹ Johnson petitions this Court, pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185 and Section 10 of the Federal Arbitration Act, 9 U.S.C. § 10, to vacate the October 11, 2016 arbitration award (“Award”) issued by James Carter. This Court should set aside the Award due to substantive and procedural defects that were manifest throughout the arbitral process and the additional reasons below.

In the absence of a substantively and procedurally appropriate arbitration process, the National Football League and the National Football League Management Council (collectively the “NFLMC”) breached their obligations under a collectively bargained agreement. The National Football League Players Association (“NFLPA”) also violated its Duty of Fair Representation under the National Labor Relations Act (“NLRA”), 29 U.S.C. § 151 et seq., violated the Labor-Management Reporting and Disclosure Act of 1959, and deprived Johnson of the lawful exercise of rights accruing to him under a collectively bargained agreement and under federal labor law. Finally, Johnson is entitled to equitable and monetary relief and a declaratory judgment, under 28 U.S.C. § 2201, regarding Defendants’ multiple breaches and violations.

For his First Amended Complaint, Johnson further pleads as follows:

PARTIES

1. Johnson resides at 2400 Rosewood Lane, Edmond, Oklahoma 73013, and is employed as a professional football player by the National Football League Philadelphia Eagles ~~franchise~~ club.

¹ Johnson previously filed his Motion to Vacate the Arbitration Award on January 6, 2017, briefing on which the Court stayed.

2. The NFLPA, located at 1133 20th Street, NW, Washington, DC 20036, is an employee organization recognized as the exclusive bargaining representative of professional football players employed by National Football League ~~franchises~~clubs and regularly does business within this District. The NFLPA resides within and has continuous and systematic contacts with this District.

3. The National Football League, located at 345 Park Avenue, New York, NY 10154, is an unincorporated association of 32 separately owned and operated professional football ~~franchises~~clubs, which regularly does business within this District. One of the 32 member clubs resides within this District and the National Football League has continuous and systematic contacts with this District.

4. The National Football League Management Council, located at 345 Park Avenue, New York, NY 10154, is an entity that represents the separately owned and operated 32 professional football ~~franchises~~member clubs in collective bargaining and labor relations, provides such representation within this District, and regularly does business within this District. One of the 32 member clubs resides within this District and the National Football League Management Council has continuous and systematic contacts with this District.

RELEVANT NON-PARTIES

5. Adolpho Birch, III (“Birch”) is Vice President of Labor Policy & League Affairs for the National Football League and exercised the authority of the National Football League Commissioner under the collectively bargained National Football League Policy on Performance-Enhancing Substances 2015 (the “2015 Policy”).

6. James Carter (“Carter”) is an attorney with the law firm of Wilmer Hale and is the arbitrator who presided over Johnson’s appeal of the discipline the NFLMC issued him for allegedly violating the 2015 Policy.

7. Michael D. Levine, M.D. (“Levine”) is the independent toxicologist who Johnson retained to observe the “B” sample analysis of his specimen under Section 4.2 of the

8. John A. Lombardo, M.D. (“Lombardo”) held the position of Independent Administrator of the 2015 Policy, at all times relevant to the matters raised herein.

JURISDICTION AND VENUE

9. This is an action pursuant to: Section 301 of the Labor Management Relations Act (“LMRA”), 29 U.S.C. § 185; Section 10 of the Federal Arbitration Act (“FAA”), 9 U.S.C. § 10; Title I and Title VI of the Labor-Management Reporting and Disclosure Act (“LMRDA”), 29 U.S.C. § 401, *et seq.*; and Section 2201 of the Declaratory Judgments Act, 28 U.S.C. § 2201. This Court has subject matter jurisdiction in this action pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 185.

10. The NFLPA represents and derives revenues from its professional football player members who perform services within this District. NFLPA members also reside within this District.

11. The NFLPA is responsible for contesting discipline imposed by the NFLMC under the 2015 Policy. The NFLPA has represented players with respect to discipline imposed under the 2015 Policy within this District.

12. ~~11.~~ The NFLMC derives revenue from professional football players who perform services within this District, as well as from its control over advertising, ticket sales, merchandising, and broadcast revenue throughout ~~the State of~~ Ohio, and is subject to personal jurisdiction in this District.

13. The NFLMC imposes discipline under the 2015 Policy and it has imposed discipline under the 2015 Policy against players within this District.

14. ~~12.~~ In 2016, no fewer than 10 National Football League ~~franchises~~clubs did business in this District. Approximately the same number of National Football League ~~franchises~~clubs does business in this District every calendar year. For example, the National

15. ~~13.~~ The operative facts and violations underlying this litigation, in whole or in part, occurred within this District.

16. The following events took place in Ohio concerning Johnson's claims:

- a. The NFLMC and the NFLPA held the Rookie Symposium in Aurora, Ohio at the Bertram Hotel;
- b. The NFLMC and the NFLPA held the Rookie Symposium in Aurora, Ohio from 2012-2015;
- c. The NFLMC and the NFLPA required Johnson to attend the 2013 Rookie Symposium and that Symposium occurred in this District from June 23- June 29, 2013;
- d. During the 2013 Rookie Symposium, and within this District, Johnson received his only collective training from the NFLMC and the NFLPA concerning performance-enhancing substances;
- e. During the various Rookie Symposiums occurring in this District, the NFLMC and the NFLPA paid for services in this District to allow for the presentation of materials concerning performance-enhancing substances;
- f. The NFLMC provided Johnson with materials and information concerning performance-enhancing substances at the 2013 Rookie Symposium within this District;
- g. The NFLPA provided Johnson with materials and information concerning performance-enhancing substances at the 2013 Rookie Symposium within this District;
- h. The NFLMC and NFLPA's policies on performance-enhancing substances are at the core of this litigation and are applied and enforced within this District;

- i. At least until September 2015, the NFLMC and NFLPA retained Lombardo to administer the 2015 Policy and its successor policies from Ohio;
- j. At least until September 2015, the NFLMC and the NFLPA paid Lombardo to direct and administer the 2015 Policy and its predecessor policies in Ohio;
- k. Players, including Johnson, were required to contact Lombardo concerning questions that they had regarding the 2015 Policy and its predecessor policies in Ohio;
- l. The NFLMC has disciplined players under the 2015 Policy and its predecessor policies within this District;
- m. Lombardo directed testing under the 2015 Policy and its predecessor policies within this District;
- n. Lombardo created and maintained the database for reasonable cause testing in Ohio;
- o. Lombardo instructed the collection testing vendor to test players, including Johnson, from Ohio;
- p. Lombardo required players, including Johnson, to send any therapeutic use exceptions to Ohio;
- q. Lombardo placed Johnson in the reasonable cause testing protocol from the state of Ohio;
- r. Lombardo made decisions to keep Johnson in the reasonable cause testing program from Ohio;
- s. At all times material to this First Amended Complaint, Lombardo acted as the joint agent of the NFLMC and the NFLPA;
- t. Johnson appealed his discipline under the 2015 Policy from this District;

- u. Johnson, in this District, sent and received information to and from the NFLMC and the NFLPA concerning his appeal;
- v. Carter held a discovery hearing, in part, in this District on September 22, 2016;
- w. At that time, and continuously since, Johnson objected to Carter's service as an arbitrator in this matter from this District;
- x. Carter reached certain conclusions regarding Johnson's appeal based upon the hearing that occurred, in part in this District, and included the same in his Award;
- y. A court reporter transcribed the September 22, 2016 hearing in this District and indicated that the location of the hearing was within this District;
- z. The NFLMC ordered a copy of the September 22, 2016 transcript, which clearly reflected a location of Cleveland, Ohio, which is in this District. Upon receipt of the transcript, the NFLMC did not object to this location;
- aa. The NFLPA ordered a copy of the September 22, 2016 transcript, which clearly reflected a location of Cleveland, Ohio, which is in this District. Upon receipt of the transcript, the NFLPA did not object to this location;
- bb. The court reporter transcribed the hearing concerning this appeal in this District and sent a copy of the transcript to Carter, the NFLMC, and the NFLMC from this District;
- cc. The NFLMC and the NFLPA paid for the court reporter's services within this District concerning Johnson's appeal;
- dd. The NFLPA engaged in fraud, dishonesty, and misconduct within this District when it provided Johnson with false information concerning his appeal, including, but not limited to, misrepresenting terms of oral

or written agreements or modifications with the NFLMC concerning

the 2015 Policy and failing to provide Johnson with the actual terms of

the 2015 Policy;

ee. The NFLMC engaged in fraud, dishonesty, and misconduct within this

District when it provided Johnson with false information concerning

his appeal, including, but not limited to, misrepresenting terms of oral

or written agreements or modifications with the NFLMC concerning

the 2015 Policy, failing to provide Johnson with the actual terms of the

2015 Policy, and providing false information during the September 22,

2016 hearing and on September 30, 2016 to Carter concerning the

protocols used to test Johnson's specimens;

ff. The NFLMC enforced the 2015 Policy and its predecessor policies on

players within this District; and,

gg. The NFLPA was required to represent its members' interests

concerning the 2015 Policy and its predecessor policies within this

District.

17. ~~14.~~ On or about June 23, 2013 to June 29, 2013, ~~while employed by~~ after the Philadelphia Eagles NFL ~~franchise~~ member club drafted him, Johnson worked as a professional football player in Aurora, Ohio, which is within this District.

~~15. On or about June 23, 2013 to June 29, 2013, in Aurora, Ohio, Johnson received information from the NFLMC and NFLPA concerning performance enhancing substances and the NFLMC and the NFLPA's collectively bargained policy on performance enhancing substances. The NFLMC and NFLPA's policies on performance enhancing substances are at the core of this litigation and applied and enforced within this District.~~

18. ~~16.~~ Venue is proper in this Court under 28 U.S.C. § 1391 and 29 U.S.C. § 185, as the National Football League, the National Football League Management Council, and the

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NFLPA have continuous and systematic contacts with this District, regularly transact business
in this District and transacted business directly relating to Johnson's claims within this
District.

FACTS

I. BACKGROUND

a. Johnson's Terms of Employment

19. ~~17.~~ Johnson has been a professional football player employed by the NFL's Philadelphia Eagles ~~franchise~~club since 2013.

20. ~~18.~~ As a professional football player in the National Football League, Johnson is represented by the NFLPA.

21. ~~19.~~ The NFLMC manages an association of professional football ~~franchises~~clubs for purposes of labor management and collective bargaining.

22. ~~20.~~ The current Collective Bargaining Agreement ("CBA") negotiated between the NFLMC, on behalf of the National Football League member ~~franchises~~clubs, and the NFLPA, on behalf of all National Football League players, is in effect from August 4, 2011 until the last day of the 2020 League Year.

23. ~~21.~~ Johnson's terms and conditions of employment are governed by the CBA.

24. ~~22.~~ In addition to the CBA, Johnson's terms and conditions of employment were governed by the 2015 Policy, a collectively bargained agreement between the NFLPA and the NFLMC concerning performance-enhancing substances. The 2015 Policy is attached as Exhibit A.

25. ~~23.~~ The 2015 Policy was a collectively bargained agreement under Section 104 of the LMRDA.

26. ~~24.~~ Section 1 of the 2015 Policy states that:

The Parties ... recognize the importance of transparency in the Policy's procedures, including the scientific methodologies that underlie the Policy, the appeals process and the basis for discipline imposed, and reaffirm their

commitment to deterrence, discipline and a fair system of adjudication.

Ex. A at p. 2.

27. ~~25.~~ Section 3.1 of the 2015 Policy sets forth the specific circumstances under which the NFLMC is permitted to test players for performance-enhancing substances. Specifically, the 2015 Policy allows for testing under the following, mutually exclusive circumstances: pre- employment, annual, preseason, regular season, postseason, off-season, and for reasonable cause. Ex. A at pp. 5-6.

28. ~~26.~~ As set forth in the 2015 Policy:

Players who are placed into the reasonable cause program based on a violation of the Policy must remain in the program for a minimum of two years or two full seasons, whichever is shorter, after which the Independent Administrator must either discharge the Player or notify him in writing that he will remain in the program subject to review at a later date.

Ex. A at p. 6.

29. ~~27.~~ Under the 2015 Policy, a player must provide a urine sample when directed to do so and faces discipline for refusing to do so. Ex. A at p. 7.

30. ~~28.~~ After a player provides a urine sample under the 2015 Policy, the sample is divided into an “A” sample and a “B” sample. Ex. A at pp. 8-9.

31. ~~29.~~ Under the 2015 Policy, if a player’s “A” sample tests positive for a prohibited substance, the “B” sample will be tested for the purpose of confirming the positive “A” sample test. Ex. A at pp. 8-9.

32. ~~30.~~ Section 4.2 of the 2015 Policy sets forth the procedure for testing the “B” sample.

Ex. A at pp. 8-9.

33. ~~31.~~ “The ‘B’ sample analysis will be performed at the same laboratory that did the ‘A’ sample analysis according to the established analytical procedures and by a technician other than the one performing the ‘A’ confirmation tests.” Ex. A at p. 9.

34. ~~32.~~ A player may choose to have the “B” sample test observed by an

35. ~~33.~~ The 2015 Policy states that:

If the “B” sample analysis generates a positive result, and the Chief Forensic Toxicologist certifies that result, the Independent Administrator will provide written notice, together with a copy of the laboratory documentation, to the Player and Parties.

Ex. A. at p. 9.

36. ~~34.~~ Appendix B of the 2015 Policy identifies Dr. Bryan Finkle (“Finkle”) as the Chief Forensic Toxicologist (“CFT”). Ex. A at p. 27.

37. ~~35.~~ Section 6 of the 2015 Policy sets forth the number of regular and postseason National Football League games a player may be suspended, without pay, for specific violations of the 2015 Policy. Ex. A at pp. 10-11.

38. ~~36.~~ Players suspended under Section 6 also forfeit any applicable bonus amounts in accordance with Article 4, Section 9 of the CBA. Ex. A at p. 19.

39. ~~37.~~ Sections 9, 10, and 11 of the 2015 Policy set forth the process for appealing discipline issued under the 2015 Policy. Ex. A at pp. 13-18.

40. ~~38.~~ An appeal under the 2015 Policy includes, in part, the following:

- a. “All appeals under Section 6 of this Policy shall be heard by third-party arbitrators not affiliated with the NFL, NFLPA or [NFL ~~franchises~~ Clubs.” Ex. A at p. 13.
- b. “Policy” is defined by the 2015 Policy as “this Policy on Performance-Enhancing Substances.” Ex. A at p. 1.
- c. The NFLMC and the NFLPA had to select “no fewer than three but no more than five arbitrators to act as hearing officers for appeals under Section 6 of this Policy.” Ex. A at p. 13.
- d. The selected group of arbitrators “shall designate one of its members to be the Notice Arbitrator, who also will be responsible for assignment of

appeals” and that the “Notice Arbitrator will ensure that at least one arbitrator is assigned to cover every Tuesday of the playing season through the Super Bowl” and that the Notice Arbitrator will develop such schedule before “the first preseason game.” Ex. A at p. 13.

- e. A player may be represented by counsel for his appeal and arbitration. However, the 2015 Policy also states that, “the NFLPA may attend and participate notwithstanding the Player’s use of other representation.” Ex. A at p. 16.
- f. In any case involving an alleged violation, the NFLMC “shall have the burden of establishing the Positive Test Result and that it was obtained pursuant to a test authorized under the Policy and was conducted in accordance with the collection procedures and testing protocols of the Policy and the protocols of the testing laboratory (herein collectively ‘the Collection Procedures’).” Ex. A at p. 16.
- g. The NFLMC “may establish that a test result was ‘positive’ by introducing analytical findings provided by the testing laboratory and verified by the Chief Forensic Toxicologist.” Ex. A at p. 16.
- h. A Player “may challenge the initial showing by the Management Council that the result was ‘positive’ or that it was obtained pursuant to a test authorized under the Policy or was conducted in accordance with the Collection Procedures.” Ex. A at p. 17.
- i. “If the Player alleges a deviation from the Collection Procedures with credible evidence, the Management Council will carry its burden by demonstrating that: (a) there was no deviation; (b) the deviation was authorized by the Parties; or (c) the deviation did not materially affect

the accuracy or reliability of the test result.” Ex. A at p. 17.

- j. As part of the appeal, other than bargaining history and information about other players, a player and the NFLMC may make written requests for additional discovery. Ex. A at pp. 17-18.
- k. As part of the appeal, there is no limitation on the “Players Association’s access to appropriate information concerning all violations under the Policy.” Ex. A at p. 18.

41. ~~39.~~ The 2015 Policy also requires that the Independent Administrator and the CFT “develop procedures for the handling of NFL Player specimens following laboratory analysis, which procedures shall be subject to approval by the Parties. These procedures will ensure the destruction of...positive specimens within 30 days of final adjudication of a Player’s discipline” (“the Section 16 Procedures”). In addition, once the procedures were developed, the CFT was to “monitor compliance and promptly report any confirmed or suspected failures to adhere to the retention and destruction procedures.” Ex. A at p. 20.

b. Johnson’s 2014 Discipline under the Policy and Placement in the Reasonable Cause Testing Program

42. ~~40.~~ On April 23, 2014, Johnson was tested for performance-enhancing substances under the preceding version of the 2015 Policy then in effect. By letter dated May 19, 2014, Lombardo notified Johnson from Ohio that his test was positive and that he would be placed on “reasonable cause testing, under which [he] may be tested up to twenty-four (24) times per year (July 1st through June 30th).” Lombardo’s May 19, 2014 letter was an exhibit at Johnson’s October 4, 2016 hearing.

43. ~~41.~~ By letter dated July 1, 2014, Lombardo notified Birch from Ohio that Johnson was “subject to both disciplinary action and reasonable cause testing.” By letter dated July 15, 2014, Johnson was notified by Birch that Johnson would be suspended for four games and would remain in “reasonable cause testing.” Lombardo’s July 1, 2014 letter was an exhibit

44. ~~42.~~ Johnson served this four-game unpaid suspension during the first four regular season games of the 2014 National Football League season.

45. ~~43.~~ From May 19, 2014 through July 11, 2016, a period of more than two calendar years and more than two full National Football League seasons, Johnson was required to submit to "reasonable cause testing" with all of the results being negative. Those tests, in whole or in part, were directed by Lombardo from Ohio.

46. The date Lombardo placed Johnson in the reasonable cause testing program from Ohio is at the core of this dispute.

c. Johnson's 2016 Testing and Discipline Under the 2015 Policy

47. ~~44.~~ On July 11, 2016, after more than two years and two full National Football League seasons in the reasonable cause testing program, Lombardo directed Johnson to submit to

another test. Rather than face discipline for refusing to submit, Johnson provided a urine sample on July 12, 2016, as directed.

48. ~~45.~~ By letter dated July 28, 2016, Lombardo notified Johnson that the "A" sample Johnson provided on July 12, 2016 was allegedly positive.

49. ~~46.~~ Johnson timely exercised his right under Section 4.2 of the 2015 Policy and notified Lombardo that Levine would observe the "B" sample test on his behalf.

50. ~~47.~~ On August 13, 2016, Levine exchanged emails with Lombardo in preparation for the "B" sample test and requested copies of the testing laboratory's "policy and procedure manual regarding chain of custody, as well as storage and testing of samples prior to my observing, such that I can be familiar with the policies prior to the actual observing of the sample."

51. ~~48.~~ On August 15, 2016, Lombardo denied Levine's request for information stating, "No laboratory policy or procedures are made available to the observing toxicologist."

Upon information and belief, the NFLMC instructed Lombardo to deny Levine's request.

52. ~~49.~~ On August 17, 2016, Levine responded to Lombardo's refusal to provide the requested information, stating, "your refusal to provide the requested and applicable laboratory policies, protocols, and procedures significantly compromises my ability to effectively observe and evaluate the B sample test."

53. ~~50.~~ On August 19, 2016, the "B" sample test took place at the UCLA Olympic Analytical Laboratory in Los Angeles, California ("UCLA Lab").

54. ~~51.~~ Levine appeared to observe the "B" sample test on August 19, 2016 and asked UCLA Lab director Dr. Anthony Butch ("Butch") to provide the laboratory policies, protocols, and procedures, including the storage temperature logs for Levine's review prior to the "B" sample test. Butch made clear that such documents existed, but, like Lombardo, refused to provide them to Levine. Upon information and belief, Lombardo and/or the NFLMC instructed Butch not to provide Levine any documents or materials Levine requested.

55. ~~52.~~ Upon information and belief, Johnson's "B" sample was not analyzed "by a technician other than the one performing the 'A' confirmation test." Ex. A at p. 9.

56. ~~53.~~ On September 1, 2016, Johnson received an email from Lombardo notifying him that the "B" sample test confirmed the "A" sample positive test. On September 6, 2016, Birch notified Johnson that, due to the positive "B" sample test, Johnson was being suspended without pay for ten (10) games pursuant to the 2015 Policy.

d. Under the 2015 Policy, Johnson Appeals the 2016 Discipline to Arbitration

57. ~~54.~~ By letter dated September 8, 2016, Johnson timely appealed his 10-game unpaid suspension under the 2015 Policy "and the manner in which the NFL has applied the Policy." from Ohio.

58. ~~55.~~ Prior to the arbitration, Johnson sought information from Ohio directly related to his appeal under the 2015 Policy including, but not limited to, information about